



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
FREEDOM OF INFORMATION ACT BRANCH
Washington, D.C. 20570

Via email

May 17, 2022

Re: FOIA Request NLRB-2021-001052 (second interim release)

Dear Jason R. Baron (University of Maryland):

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received on June 24, 2021, in which you seek, in relation to the Board's "Capstone" email policy, the following:

1. Guidance to staff on the Capstone email policy as issued by leadership officials, records management officials, the Office of the Chief Information Officer (CIO), the General Counsel's office, the FOIA staff, or any other office responsible for the management of email records. This request includes any guidance issued as early as 2015 as well as any subsequent updates or revisions to the guidance.
2. Any documents discussing implementation of General Records Schedule 6.1, including but not limited to the listing or designation of agency officials on NARA Form NA-1005.
3. Documentation describing the proprietary software used in implementing the agency's Capstone email policy, including what software or platform is used to store Capstone emails in or electronic repositories.
4. Emails between or among staff concerning the agency's Capstone email policy or program, including discussions concerning the initiation of the policy, implementation and management of email under the policy and/or changes made to any element of the Capstone policy.
5. Any agency letters, reports, e-mails, or other documents discussing or containing information about the agency's Capstone email policy sent to or in response from external sources, including either to or from Congress, NARA, DOJ, another Executive branch agency, the Government Accountability Office, or in connection with an audit or investigation by the agency's Inspector General of the agency's recordkeeping programs or other matters.

You assumed financial responsibility for the processing of your request in the amount of \$25.00.

We acknowledged your request on June 24, 2021. On August 27, 2021, we provided the second interim release of 18 pages of records responsive to Items 1 and 3 of your

request. On December 29, 2021, in an email with a member of my staff you agreed to narrow your request to the following:

1. In the original category (4) of the request, I wish NLRB to conduct a search for Capstone-related emails and attachments of the two individuals who signed NARA Form 1005 on behalf of NLRB, namely, (i) Kenneth Williams, and (ii) Prem Aburvasamy;
2. In conducting a search, I ask that NLRB search for the terms "Capstone policy" or "Capstone approach;"
3. If there are a large number of "hits," I invite NLRB to provide me with another interim response consisting of on the order of 100 emails and their attachments. Once I have reviewed those, I will let you know whether the production is sufficient to close out this request. I wish to reserve the right, however, to ask for a further production and/or to appeal any redactions or withholdings of individual documents;
4. I also wish to receive a response to the original category (5), involving any external correspondence NLRB has had with Congress, GAO, DOJ, or NARA, with respect to Capstone, excluding reports that are available online. Again, a search can be conducted using the above terms. However, I would ask that NLRB also check with its legislative affairs office for any knowledge they have about correspondence to the Hill; and
5. Finally, we also talked about my desire to interview Mr. Williams about NLRB's implementation of its Capstone policy. This is not an immediate request; I would be happy to hold off until we have progressed further in satisfying the original FOIA request.

Based on the scope of your request and the significant amount of time that would be involved in searching for and reviewing records for applicable FOIA Exemptions responsive to all five items of your request, I am providing a second interim release of records which contains 100 emails and their attachments that are responsive to request item 4.

In order to provide this second release of records, searches of the Outlook accounts for Kenneth Williams and Prem Aburvasamy were conducted. These searches yielded 144 pages of responsive, releasable records, which are attached.

After a review, I have determined that portions of the records are exempt from disclosure under Exemptions 5 and 7E of the FOIA (5 U.S.C. § 552(b)(4), (b)(5), (b)(6) and (b)(7)(E)). Specifically, redactions have been made pursuant to Exemption 5 which protects the internal decision-making processes of government agencies to safeguard the quality of agency decisions. 5 U.S.C. § 552(b)(6). Further, redactions have been

made pursuant to Exemption 7E which protects records or information compiled for law enforcement purposes that “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E).

Your request is denied to the extent that other responsive records yielded from the search are being withheld in their entirety pursuant to FOIA Exemption 5 (5 U.S.C. § 552(b)(5)).

Regarding FOIA Exemption 5, draft documents and internal memoranda are being withheld pursuant to Exemption 5, 5 U.S.C. § 552(b)(5). Exemption 5 allows agencies to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency,” and covers records that would “normally be privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997). The deliberative process and the attorney work-product privileges are two of the primary privileges incorporated into Exemption 5.

The deliberative process privilege protects the internal decision-making processes of government agencies to safeguard the quality of agency decisions. *Competitive Enter. Inst. v. OSTP*, 161 F. Supp.3d 120, 128 (D.D.C. 2016). The basis for this privilege is to protect and encourage the creative debate and candid discussion of alternatives. *Jordan v. U.S. Dep’t of Justice*, 591 F.2d 753, 772 (D.C. Cir. 1978). Two fundamental requirements must be satisfied before an agency may properly withhold a record pursuant to the deliberative process privilege. First, the record must be predecisional, *i.e.*, prepared in order to assist an agency decision-maker in arriving at the decision. *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). Second, the record must be deliberative, *i.e.*, “it must form a part of the agency’s deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Judicial Watch, Inc. v. FDA*, 449 F.3d at 151 (quoting *Coastal States Gas Corp. v. U.S. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). To satisfy these requirements, the agency need not “identify a specific decision in connection with which a memorandum is prepared. Agencies are . . . engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.” *Sears, Roebuck & Co.*, 421 U.S. at 151 n.18 (1975). Moreover, the protected status of a predecisional record is not altered by the subsequent issuance of a decision, *see, e.g., Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979); *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005) or by the agency opting not to make a decision. *See Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995), *aff’d*, 76 F.3d 1232 (D.C. Cir. 1996) (citing *Russell v. U.S. Dep’t of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982)).

Here, the responsive records being withheld meet the requirements for Exemption 5 protection under the deliberative process privilege. They are internal and predecisional. They reflect the views of Agency employees concerning the implementation of Capstone. Since they contain internal discussions, these casehandling records clearly reflect the deliberative and consultative process of the Agency that Exemption 5 protects from disclosure. *Sears, Roebuck and Co.*, 421 U.S. at 150-52.

For the purpose of assessing fees, we have placed you in Category B, as an educational institution that operates a program or programs of scholarly research, NLRB Rules and Regulations, Section 102.117(d)(1)(vi). Given your placement in the educational category, there is no charge assessed for emailed records and, therefore, your request for a fee waiver is moot.

You may contact Stephanie Ostrowski, the Attorney-Advisor who processed your request, at (202) 501-8648 or by email at stephanie.ostrowski@nlrb.gov, as well as the Agency's FOIA Public Liaison, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency's FOIA Public Liaison is:

Kristine M. Minami
FOIA Public Liaison
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: FOIAPublicLiaison@nlrb.gov
Telephone: (202) 273-0902
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
Email: ogis@nara.gov
Telephone: (202) 741-5770
Toll free: (877) 684-6448
Fax: (202) 741-5769

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You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at:

<https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt
Chief FOIA Officer
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: DLCFOIAAppeal@nrlrb.gov

Any appeal must be postmarked or electronically submitted within 90 days of the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the FOIA Specialist, Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

/s/ *Synta E. Keeling*

Synta E. Keeling
FOIA Officer

Attachment: (144 pages)